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No. 140

Supreme Court of the United States

OCTOBER TERM, 1942.

EUGENE W. OSMENT, PETITIONER,

VS.

NORMAN B. PITCAIRN AND FRANK C. NICODEMUS, JR., RECEIVERS OF THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Eugene W. Osment, respectfully shows as grounds for the issuance of a writ of certiorari to the Supreme Court of the State of Missouri:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action for damages for permanent and totally disabling bodily injuries sustained by petitioner

August 21, 1939, while acting within the scope of his duties as an employee of respondents. The action was brought under the Federal Employers' Liability Act as amended effective August 11, 1939 (45 U. S. C. A., Sec. 51, et seq.), 52 Stat. 1404. A jury rendered a verdict for Fifty Thousand Dollars in petitioner's favor in the trial court, which was reduced on remittitur to Thirty-five Thousand Dollars, and judgment entered thereon (R. a-c 306, 500-501). There was no dispute as to the applicability of the Federal Employers' Liability Act (R. 13, 14, 510). The judgment was reversed outright on appeal to the Supreme Court of Missouri (R. 516).

Petitioner was a member of an interstate switching crew. He was standing by the drinking fountain in respondents' freight house awaiting orders when one John Stalac, a messenger employed by respondents, and known by them to be habitually addicted to rough and dangerous horseplay, in walking through the freight house with papers, walked up behind petitioner, seized him around his neck and shoulder in such a manner that he could not get loose, and squeezed his windpipe so tightly he finally lost consciousness and eventually fell to the floor, fracturing his skull on the concrete floor. One Finnell, a member of the railway police, was a few feet away at the time but failed to act to prevent the seizure and injury although he had time to do so (Opinion of Mo. Ct., R. 510-511).

The Missouri court held that although the evidence was sufficient to show negligence on the part of respondent's officers, and agents in retaining such dangerous and habitually reckless servant, known to indulge in dangerous horseplay on its premises as would entitle plaintiff to a recovery under the common law of

negligence, there could be no recovery under the Federal Employers' Liability Act; and on the second theory held that although a member of respondents' police force was present with the ability and means of preventing the injury, there could be no recovery under the Federal Act for his failure to perform his duty, because of its ruling as to the first theory (R. 510-516).

FIRST THEORY OF RECOVERY.

(a) Pleadings.

It was alleged that Stalac was "incompetent, habitually careless, and an improper and dangerous person to have and retain in such employment, and defendant knew he was young, big, strong and had propensities to show his power by scuffling and grappling and violently seizing other employees from behind, and that he was dangerous in and near the employment of other of defendants' agents and the plaintiff herein;" that said Stalac had on many occasions assaulted, seized, beaten up, attacked, scuffled, injured and threatened to injure many different employees of defendant over a long period of time, all of which facts were known to defendant, and, "Plaintiff further states that said defendant company, its agents and servants, carelessly and negligently retained and continued the said agent John Stalac in its employment aforesaid after defendant company, its officers and agents knew or by the exercise of ordinary care could or should have known of the foregoing facts about said Stalac" (R. 2-6).

(b) Evidence.

Petitioner's proof showed that John Stalac habitually engaged in rough horseplay and the railroad had knowledge of the fact (Opinion R. 510). He was a large, rough fellow, always engaging in horseplay. The fore-

man and the other members of plaintiff's switching crew testified that they had seen Stalac scuffling with other railroad employees who were on the job, although this was contrary to instructions, and that he displayed himself like a prizefighter and sparred with other men. Plaintiff testified that he was "a fellow that liked to scuffle with the fellows;" that he had grabbed other men and thrown them around and tussled with them; that he would grab them around the neck and shoulders and scuffle with them and throw them down. Three negroes employed in the warehouse testified that he was strong and scuffled with other employees and was "over average rough;" that he would grab them by the neck or arm or go along and hit them in the back of the legs so that they would go down; that he would grab men and lift them up until their face turned red; that he would bear down on the rear end of a loaded truck as it was being pulled and cause the handle to fly up. Once he had grabbed a freight house employee's breast so hard that he had to have medical attention and there was evidence that these practices had continued for four or five years. Although he did not act in anger, he was continually engaged in dangerous and unnecessarily rough horseplay. The defendants introduced no testimony to contradict that of plaintiff and put no witnesses on the stand, except medical witnesses (R. 27, 28, 34, 41, 46, 58-60, 62-63, 85, 87, 88, 90, 94, 96, 100-105, 109-110, 111, 113, 114, 116, 118-119, 157, 161).

(c) Petitioner's Claim.

Petitioner claims that respondents had a duty to exercise reasonable care not to employ or keep in service servants known to misconduct themselves outside the course of their employment so as to create a risk of danger of bodily harm to other employees. It is peti-

tioner's first theory of recovery that this duty was breached by negligently retaining in their employment a servant who, to their knowledge, was in the habit of misconducting himself in a manner dangerous to others. Petitioner contends that such doctrine of common law tort liability forms a basis of recovery under the Federal Employers' Liability Act.

(d) Holding of Missouri Court.

The Supreme Court of Missouri, after setting out the pleadings and the facts, recognized the existence of the theory of recovery sought to be invoked and cited the cases supporting such theory of common law recovery. It went on to hold that the Federal courts might also recognize petitioner's theory of recovery, "and construe the conduct complained of as being negligent." The sole reason given for reversal is that under the Federal Employers' Liability Act, "The Supreme Court of the United States * * * has refused to impose liability on employers for acts of employees when outside the scope of their employment and not in furtherance of their employers' business" (R. 510-512). This holding does not pass on the question at issue. No court, as far as we know, has ever imposed liability upon an employer for the *act* of an employee outside the scope of his employment, on the theory of *respondeat superior*. Petitioner did not seek recovery on the theory that the *act* of Stalac was the *act of the company*. Petitioner seeks to hold the respondents for the *acts of Stalac's superiors* in retaining him with knowledge of his propensities.

SECOND THEORY OF RECOVERY.

The second theory of recovery pleaded, shown by the evidence, and submitted in the instruction is entirely

separate and apart from the first. It is based on the failure of Finnell, a member of the special service department, engaged in the course of his duties, to act to prevent the plaintiff's injuries when he was charged by the company with acting under such circumstances. Petitioner contends that he had a right to go to the jury on this theory even if the first theory of negligence in retaining Stalac were completely out of the case.

(a) Pleadings.

As its second ground of recovery, plaintiff alleged that the respondents, "employed, provided, and maintained one Finnell as a peace officer, that part of his duties within the scope of his employment was to warn, prevent, and stop any and all bodily attacks, seizures, fights, assaults, dangerous and pugnacious conduct aforesaid in his presence by one employee, upon the person of another and more particularly plaintiff under the circumstances;" that said police officer acting within the scope of his employment knew or by due care could have known of Stalac's habits and disposition and that he was present at the time and permitted said assault, "when, in the exercise of ordinary care and in the scope and duty of employment, said defendant company, by and through its agent and peace officer, with the means at hand and in time, could or should have stopped and prevented said danger to the plaintiff and the seizure aforesaid and could or should have warned the plaintiff of the presence of said dangerous John Stalac and of the impending seizure and attack in time, by the exercise of ordinary care, to have prevented same and to have prevented the resultant permanent injuries after the seizure and peril to plaintiff arose, all of which the defendant company, by and through its agent, servant and peace officer, carelessly and negligently failed to do" (R. 5-6).

(b) Evidence.

The evidence showed that respondents had created a Special Service Department extending over its entire system which undertook a general and continuing duty at all times, not based upon any specific occurrence or any specific man; that it was organized to preserve order upon the premises of the company, to aid in quelling disturbances, to uphold and enforce the law, to prevent an immediate breach of the peace, and to act as a preventive force in regard to unlawful violence. It was admitted that at the time of the assault in question one Walter Finnell was acting as a patrolman in this department in the scope of his employment for defendant (R. 13, 14, 17-19, 289, 290).

In performing the duties placed on them by the company, members of the department acted to control conduct of employees outside the scope of their employment. Finnell in performing the duties thus assumed by the company in creating the department, and in acting for the company in that department had at various times spoken to different employees about engaging in horseplay on the premises and had instructed them to stop it (R. 46, 67). On previous occurrences, he had warned Stalac to stop his rough scuffling and to quit playing before he hurt somebody (R. 94). Finnell had been present on numerous occasions when Stalac was engaged in such conduct (R. 91, 92, 94, 105, 106). Brown, another member of that department, had also observed such conduct (R. 106). After the assault Finnell told Osment that he had talked to Stalac about his "rough stuff" before and warned him to quit it, and said, "Now you are hurt and I have got to report it" (R. 121).

Thornhill, another member of the department, had talked to Stalac about this conduct and warned him to

quit it because he knew that if it was kept up he was going to hurt someone (R. 140, 226).

Finnell had given orders and instructions about conduct to various employees prior to the occurrence in question (R. 67). Following the occurrence, Finnell made a report to his superior (R. 66).

The uncontradicted evidence showed that Finnell saw Stalac, a big, powerful man whose past dangerous propensities and practices he well knew, come quietly straight up behind Osment without turning, although he could have gone around Osment, place his left arm around Osment's neck and reach around so as to grip his left hand on Osment's other shoulder for the purpose of getting a better grip, squeezing Osment's wind pipe and main artery and pull Osment back against him, and the upper part of his body was bent backward, and Osment was held so tight he could not move or speak, and he was thus held until his eyes showed the effect of the force and his knees wobbled and gave way and he became limp and unconscious and Stalac then released him and Osment fell to the floor and then fell backwards and struck his head on the concrete. All the time this was going on, Finnell was within two to five feet of Osment and Stalac and the witnesses testified that Osment was held for 30 to 40 seconds before losing consciousness (R. 21-27, 33, 36, 40-45, 49, 64, 68, 69). The evidence thereon is collected and set out in the motion for rehearing (R. 539-541).

It was uncontradicted that during all this time Finnell said nothing, gave no orders, and did absolutely nothing, although others watching the occurrence saw all that took place and became alarmed (R. 22-24, 24-27, 33, 36, 40-42, 43, 44, 45, 49, 64, 68, 69).

(c) Petitioner's Claim.

It was petitioner's position under the second theory of recovery that he would be entitled to recover under those facts in the absence of any duty owed by the railroad to retain only fit and competent servants, since they had voluntarily assumed and had been performing a continuing duty through the Special Service Department, which Finnell represented, of controlling the unauthorized conduct of employees on the premises and protecting employees from unlawful violence and danger and of preventing just such type of occurrence as resulted in plaintiff's injury.

(d) Court's Holding.

The Supreme Court of Missouri, in denying recovery on this theory, said:

> "But, since there is no liability for the acts complained of, does it not follow that there could be no duty to guard against them or prohibit them? Even though Finnell, the company policeman, knew of Stalac's propensities, can liability or a breach of duty be predicated on failure to control conduct or acts for which it is not liable in the first place? * * * If the conduct resulting in plaintiff's injuries was outside the scope of Stalac's employment so that the railroad is not responsible for it, we cannot see how there could be any breach of duty or negligence in failing to guard against it or in neglecting to control him" (R. 514-515).

Thereafter on the 26th day of December, 1941, petitioner filed a motion for rehearing together with a brief in support thereof which was overruled on the 13th day of March, 1942. Petitioner has therefore exhausted all remedies available, save and except this writ of certiorari (R. 516-566).

By this decision of the Supreme Court of Missouri, petitioner, an employee of an interstate railroad corporation, has been denied the benefits provided for him under the Federal Employers' Liability Act. If this decision is the law under the Federal Employers' Liability Act, then a railroad company may be guilty of the grossest negligence in selecting, controlling and retaining dangerous employees without an employee injured thereby having any right of recovery for such negligence. If this decision is the law in cases under the Federal Employers' Liability Act, there can never be any recovery under such act where a railroad assumes a duty to its employees and then negligently breaches such duty. The present decision is contrary to the letter, the spirit, and express purpose of the Federal Employers' Liability Act in that it denies a recovery under the Federal Employers' Liability Act where a recovery would be permitted under the common law and even under the State Workmen's Compensation Law. It even denies recovery under the Federal Employers' Liability Act for violation of a duty voluntarily assumed toward employees, and regarded as necessary, although a recovery may be had under the common law for a violation of such duty. Being under the Federal Act, it is exclusive.

II.

BASIS OF JURISDICTION.

Petitioner, in support of the jurisdiction of this Court to review the within cause on writ of certiorari, respectfully states:

(a)

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Section 344), which provides in part as follows: (Section 344b)

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

(b)

Federal Statute Under Which Rights Are Claimed.

The judgment of the Supreme Court of Missouri determined rights claimed by petitioner under the Federal Employers' Liability Act as amended, effective as of August 11, 1939. 53 Stat. 1404 (Title 45 U. S. C. A., Sec. 51, *et seq.*).

(c)

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered by Division Two on December 16, 1941 (R. 509). Motion For Rehearing With Suggestions In Support Thereof was duly filed on December 26, 1941 (R. 516). On March 13, 1942, the motion for rehearing was denied (R. 566) and the judgment then became final.

(d)

Nature of Case and Ruling Below.

Suit was brought under the Federal Employers' Liability Act, 53 Stat. 1404 (45 U. S. C. A., Sec. 51, *et seq.*) as amended, effective August 11, 1939, and there was no issue as to petitioner's rights being governed by the Act (opinion of Mo. Sup. Ct. 510-516).

The uncontradicted evidence showed that petitioner, a switchman who had just come in on an interstate movement, was standing in the freight house waiting to get a drink while waiting for the doors to be closed on an interstate movement he was to go out on (R. 21, 22, 29, 31, 39). One Stalac, a messenger employed by respondents who was going through the freight house carrying papers, walked up behind him and without warning seized him around the neck and shoulders so as to cut off his wind, held him until he became unconscious, and then released him so that he fell to the concrete floor striking his head and fracturing his skull. One Finnell, a patrolman in the company police, charged with preserving order on the premises, and preventing such unauthorized and unlawful conduct, was within three to five feet of petitioner as Stalac came up and while the attack took place and yet did nothing to warn petitioner

or to prevent the assault or the injuries although he had time to do so (R. 24-27, 33, 43, 44, 49, 68, 69).

The uncontradicted evidence showed that Stalac during the period of some five years that he had been employed by the respondents, had habitually engaged in rough and unsafe horseplay with various employees on the premises with the respondents' knowledge (opinion of Mo. Sup. Ct. R. 510).

Plaintiff pleaded and submitted two theories of recovery: The first being that respondents were negligent in retaining in their employ the servant Stalac, who to their knowledge, was in the habit of misconducting himself on respondents' premises in a manner that was dangerous to other employees, including plaintiff (R. 2-6, 295-297).

The Supreme Court of Missouri conceded that the conduct thus complained of constituted negligence under the common law and that the Federal Courts might recognize such conduct as negligent. The Court, however, held that there could be no liability under the Federal Employers' Liability Act for the negligence of respondents in retaining Stalac because "The Supreme Court of the United States, up to the present at least, has refused to impose liability on employers for acts of employees when outside the scope of their employment and not in furtherance of their employer's business" (R. 510-512). This completely overlooked the fact that petitioner *did not seek recovery on the theory that the specific act of Stalac was the act of the company* but on the theory that the *act of Stalac's superiors* in retaining him with knowledge of his dangerous propensities *was negligence on the part of the company* which directly resulted in the occurrence and injuries in question.

Petitioner's second theory of liability was that the company, by forming the Special Service Department and charging it with the duty of policing the conduct of employees and protecting them from unlawful violence, had regarded it as necessary and assumed a duty, a failure to perform which was negligence, irrespective of any negligence in retaining Stalac; that the company through its special agent Finnell had failed to act to prevent the injury and perform the duty thus assumed by the company (R. 2-6, opinion of Mo. Sup. Ct. R. 514-515). The Supreme Court of Missouri held that since the company was not liable for the act of Stalac under the first theory, it necessarily followed that there could be no duty to guard against or prohibit such acts by him; that even though Finnell knew of Stalac's propensities, liability could not be predicated on a failure to control the acts complained of unless the view was adopted that the master was liable for the tortious acts of his employees acting outside the scope of their employment; that if the railroad was not responsible for Stalac's act on the theory of respondeat superior, it could not breach any duty in failing to guard against it (R. 514-515).

(e)

Cases Believed To Sustain Jurisdiction.

The action of the Supreme Court in this case is, so far as we have been able to determine, without precedent, either in this state or in other states. However, it is clear that no one entitled to the benefits of the Federal Employers' Liability Act can be deprived thereof by a decision which is not reviewable by this court. The following decisions sustain petitioner's assertion of jurisdiction in this Court:

Brady v. *Terminal Railroad Association*, 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614.

Toledo Railroad Company v. *Slavin*, 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671.

Chicago Railroad Company v. *Devine*, 239 U. S. 52, 36 S. Ct. 27, 60 L. Ed. 140.

Seaboard Airline Railroad Company v. *Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062.

Finality of State Court Decree.

Although the Constitution of Missouri provides for certain instances in which the losing party may apply for a transfer to the court en banc, the present case was not of the type contemplated by the Constitution as interpreted by the Supreme Court of Missouri, and the opinion of the Division became the final opinion of the Court. Section 1 of the Amendment of 1890 to Article 6 of the Constitution of the state of Missouri creates two Divisions of that Supreme Court. Section 4 of that Amendment provides for certain instances where a case shall be transferred to the court en banc. The Amendment provides: "when the Judges of a Division are equally divided in opinion in a cause, or when a Judge of a Division dissents from the opinion therein, or when a federal question is involved, the cause on the application of the losing party, *shall* be transferred to the Court for its decision, * * *." It will be noted that an application for transfer is not a matter of judicial discretion but a matter of right in certain specified instances.

In *McFadden, et al.* v. *Catron*, 138 Mo. 197, 39 S. W. 771, the Supreme Court of Missouri held that unless the case falls within the class named in Section 4 of the Constitutional Amendment of 1890, *the losing party has no right to apply for transfer to the court en banc.*

In *State* v. *Duestrow*, 137 Mo. 44, 39 S. W. 266, the Supreme Court of Missouri held that the court en banc has no superintending control over the Divisions thereof,

and further held "in each case the judgment of a Division is the judgment of a court of last resort, and ends the matter decided."

The Supreme Court of Missouri has interpreted the words "federal question" as used in the above Constitutional Amendment, and petitioner and this Court are bound by its construction. Under the decisions of the Missouri Supreme Court, the interpretation of the Federal Employers' Liability Act is not "a federal question".

In *McAllister* v. *St. Louis Merchants Bridge Terminal Railway Company,* 324 Mo. 1005, 25 S. W. (2d) 791, an action under the Federal Employers' Liability Act was involved. The losing party filed a motion to transfer the cause to the court en banc on the ground that a federal question was involved under Section 4 of the Amendment of 1890 of Article 6 of the Constitution of Missouri. The Court held that the construction to be given the Constitutional Amendment was different from that ordinarily given the term "federal question". That if the term had been used,

> "without synonymous or qualifying terms in article 6 of the Constitution as originally adopted, it might be given this broad interpretation. However, appearing as it does in an amendment to article 6, and adopted some fifteen years thereafter, we think the words 'when a federal question is involved' should be interpreted according to the standard originally indicated and still set forth in article 6. Section 12 of that article fixes our jurisdiction, and the only federal questions there mentioned are those 'involving the construction of the Constitution of the United States,' or where 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question.' When the article was amended as above, it seems reasonable to assume that the same kind of a federal question was meant as had previous-

ly been defined in the article, and such as is in itself jurisdictional rather than merely incidental to a cause of action brought here on other jurisdictional grounds.

The only federal question in this case grows out of the fact that the alleged cause of action rests on the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59). Neither the validity of the act nor 'authority exercised under the United States' is drawn in question. It follows that the motion should be, and the same is hereby, overruled."

The above opinion was followed and reaffirmed in *Barry* v. *Frisco Ry. Co.*, 324 Mo. 775, 26 S. W. (2d) 988, and *Riley* v. *Wabash Ry. Co.*, 328 Mo. 910, 44 S. W. (2d) 136, 142.

This Court has held that it is bound to accept the decision of the Missouri courts upon the construction of the Missouri constitutional provision.

In *Waggoner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 43 Sup. Ct. 589, 591, this Court, in discussing said Section 4 of the Amendment of 1890 to Article 6 of the Constitution of Missouri said:

"The question of the right to transfer was a question of Missouri law, upon which we are bound to accept the decision of the Missouri courts."

This Court in other decisions has recognized the distinction between the jurisdiction of the Supreme Court of Missouri under its constitution and the supervising powers of this Court, in regard to "Federal Questions".

Wabash Railroad Co. v. *Pearce*, 192 U. S. 179, 24 S. Ct. 231.

M., K. & T. Ry. Co. v. *Elliott*, 184 U. S. 530, 22 S. Ct. 446.

Since the right to apply for a transfer to the court en banc is one of right and not of discretion in certain

specific instances, and since this case did not fall within the designated class under the decisions of the Supreme Court of Missouri the decision of Division 2 of the Court was final and "ends the matter decided", *supra*, and petitioner had exhausted all his remedies in the Supreme Court of Missouri.

III.

QUESTIONS PRESENTED.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act as amended, effective August 11, 1939, 45 U. S. C. A., 53 Stat. 1404, *et seq*:

(1) Can an employee of an interstate carrier who is engaged in interstate commerce and whose exclusive remedy for personal injuries is under the Federal Employers' Liability Act be denied a recovery under such Act where the evidence shows that the carrier was guilty of negligence in retaining in its employ a known, habitually dangerous and incompetent employee on the sole ground that the act of the employee causing the injury was outside the scope of his employment, when the negligence relied on as resulting in the injury is not that of the employee causing the injury, but is the negligence of the agents and servants of the railroad who retained him, knowing of his dangerous propensities?

(2) Is the Federal Employers' Liability Act broad enough to cover all negligence of which an employer may be guilty, or does it leave an employee without any remedy in certain cases of the employer's negligence?

(3) Can an employee of an interstate railroad engaged in interstate commerce be deprived of a recovery for serious and permanent personal injuries caused by the breaching of a duty to the employee which the employer railroad has considered necessary and voluntarily assumed?

(4) Can an employee of an interstate railroad be denied recovery for personal injuries under the Federal Employers' Liability Act, when the employer has retained in its service an employee whom it knows to be habitually dangerous to other employees on its premises, and especially when the railroad has, or has regarded it as necessary to assume and has assumed a duty to prevent and to protect employees against such danger, and has delegated such duty to a special department for such purpose, and when a representative of such department stands by and permits one employee to injure another without doing anything to prevent it, although he has the time and ability to do so?

(5) Regardless of the question of liability in negligently retaining an employee whom it knows to be dangerous to others, can an interstate carrier escape liability under the Federal Employers' Liability Act when it regards it as necessary to assume and does assume a duty to control conduct of employees on its premises outside the scope of their employment where such conduct is dangerous to others, where the evidence shows that an employee charged by it with such duty, negligently fails to perform such duty?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) Petitioner, as grounds for the granting of a writ of certiorari by this Court to the Supreme Court of Missouri in the above cause, respectfully states that the Supreme Court of Missouri has determined substantial rights of an employee arising under the Federal Employers' Liability Act in a manner not in accord with the applicable decisions of this Court, and has passed on a set of facts not heretofore determined by this Court in a manner that does violence to the construction of the Federal Employers' Liability Act as set out in the applicable decisions of this Court.

(2) The Federal Employers' Liability Act (45 U. S. C. A., Sec. 51) provides that, "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole, or in part, from the negligence of *any* of the officers, agents or employees of such carriers * * *." The Act does not define negligence. Rights and obligations under it depend upon the applicable principles of the common law as interpreted and applied in federal courts. *Southern R. Co.* v. *Gray*, 211 U. S. 333, 36 S. C. R. 558, l. c. 561. This Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. C. R. 440, has said:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically

> restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted and to that end the word may be read to include all the meanings given to it by courts and within the word as ordinarily used. * * * 'Negligence' is a word of broad significance and may not readily be defined with accuracy."

(3) It has been said by the courts and text writers that the language used in the Act is broad enough to cover *any* negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein. *DeAtley* v. *C. & O. Ry. Co.,* 201 Fed. 591; *McDuff* v. *Kurn,* (S. Ct. Ala.), 172 So. 886; *Smithson* v. *A. T. & S. F. Ry. Co.,* 174 Cal. 148, 162 Pac. 111, 113; *Crawford* v. *Davis,* 136 S. Car. 95, 134 S. E. 247, 251; *Morris* v. *M. P. Ry. Co.,* 107 Nebr. 788, 187 N. W. 130, 133; 39 C. J. 266; *Roberts, Federal Liability of Carriers,* p. 1545.

(4) The Supreme Court of the United States in *Minneapolis, etc. Ry. Co.* v. *Rock,* 279 U. S. 410, 49 S. C. R. 363, 365, has said that under the Federal Act,

> "The carriers owe a duty to their patrons *as well as to those engaged in the operation of their railroads* to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service."

(5) The Supreme Court of the United States in *Fletcher* v. *B. & P. Ry. Co.,* 168 U. S. 135, 18 S. C. R. 35, held that a railroad owed a duty to the public to so control the conduct of employees on its trains acting outside the scope of their employment as to prevent injury to others. The Supreme Court of West Virginia in *Griffin* v. *B. & O. Ry. Co.,* 122 S. E. 912, applied the principles of the Fletcher case to an action under the Federal Employers' Liability Act and held that a de-

murrer to the petition should have been overruled where it was alleged that an interstate employee was injured by the conduct of other employees outside the scope of their employment where such conduct could have been anticipated and controlled. The Supreme Court of Alabama in *McDuff* v. *Kurn,* 172 So. 886, had before it a petition where plaintiff claimed to have been injured by reason of defendant employing and retaining a dangerous servant. The Court held that the common law prescribed a duty upon the employer for retaining a servant with knowledge of his incompetency and that the federal act could cover such conduct because it was intended to cover any act of negligence.

(6) The Missouri court in its opinion concedes that under the common law liability attaches for "knowingly retaining in one's employment one who is dangerous to others by reason of his habit of misconducting himself in a manner dangerous to others" (R. 511). It concedes that, "the federal courts might recognize plaintiff's theory of liability and construe the conduct complained of as being negligent" (R. 512). Yet it holds that there can be no recovery herein because under its construction of the Federal Employers' Liability Act, the Act is not broad enough to cover such theory of negligence. This holding is absolutely contrary to decisions of this Court setting out the interpretation to be given the Act, and the term "negligence" under the Act, and the duty of a railroad under the Act to employ and retain only fit and competent servants.

(7) The Supreme Court of Missouri, by its opinion in the present case, has declared a principle which, if allowed to stand, will be dangerous and far reaching and will narrow the benefits to be derived under the Federal Employers' Liability Act and do violence to the con-

struction that is accorded it under the decisions of this Court. Under the decision of the Missouri Court, a substantial group of railway employees entitled to receive the benefits of the Act would be wholly without a remedy as the Act is exclusive.

(8) If the opinion in the present case is the law, it will open a field for numerous and widespread abuses. Railroads may employ and retain the lowest type of belligerent and pugnacious thugs with impunity. They may fill their ranks with employees whose conduct will intimidate and threaten serious permanent injury to other employees who are in the course of their duties. They may employ and retain the type of person who will be a constant threat to other employees as to physical violence, yet escape any responsibility for such conduct as long as such employees commit their assaults outside the scope of their employment. It is seldom that unlawful violence occurs within the scope of employment. Conscientious, hard working employees would have no recourse for the excesses committed by bullies outside the course of their employment and could be intimidated into quitting their jobs, as it would be virtually impossible to ever prove that an unlawful assault was authorized by the railroad or committed within the scope of employment.

(9) The holding of the Court that there can be no recovery for the failure of Finnell to act to avoid the assault when he had the means and ability to do so and knew of Stalac's dangerous propensities, is so vicious and far reaching in its effect as to nullify the purpose of Congress in passing the Federal Employers' Liability Act in a large group of cases. Respondents regarded it as necessary and assumed the duty of controlling and policing the conduct of employees and of protecting em-

ployees from unlawful violence by forming the Special Service Department. Finnell was one of the persons charged with performing the duties the company regarded as necessary and assumed, yet the Missouri court has held that no liability attaches for his failure to act on the sole ground that the specific act of Stalac was outside the scope of his duties. If this construction of the Act is permitted to remain the law, employees can expect no protection on the premises of the company under any circumstances for injuries which are not sustained by reason of conduct of employees in the scope of their employment. They would be left at the mercy of thugs, vicious fellow servants, or other dangers, even though the company had promised and assumed a duty of protecting them from such dangers and regarded such protection as necessary. Such holding is so vicious as to require this Court to exercise its superintending powers.

(10) Although petitioner recognizes that in these trying times of national emergency this Court is occupied with matters of grave national importance, petitioner believes that in such times it is more necessary than ever that railway employees whose lives and health are necessary to the national defense should be given the full protection which Congress intended to afford such employees by passing the Federal Employers' Liability Act in the first instance, and by amending it to extend and liberalize its scope in 1939. The Missouri appellate courts have recently displayed a tendency to stray away from the principles laid down by this Court in interpreting the Federal Employers' Liability Act, and such tendency should be checked by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under seal of this Court, directed to the Supreme Court of Missouri, commanding said

Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of Eugene W. Osment, Respondent vs. Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of the Wabash Railway Company, a corporation, Appellants, No. 35575, to the end that this cause may be reviewed and determined by this Court, as provided for in the Statutes of the United States, and that the findings and rulings of said Supreme Court to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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